

of the viscera of the fish from the roe could well be striven for by the manufacturer in this case. At the same time, I am not prepared to say that the failure to make a complete separation condemns the article as a filthy thing.

"I would also point out in that connection this important thing in the administration of the Food and Drug Act. The health of the public is the main thing, of course, we are looking at. That is of most importance with reference to foods. Now, 'filthy' is a term of uncertain application. When food is manufactured under conditions where something that is foreign to the food product that is being worked upon is injected into the food product to be sold to the consumer, that, I think, is very definitely wrong. For instance, some months ago we had one or two of these cases where candy manufacturers had their goods seized on the ground that they allowed the candy to be exposed in their factories at night to the presence of rats or mice and the rats or mice would leave their excreta upon the candy. That, obviously, falls within the meaning of 'filthy'. It is the kind of thing that not only is repellent to a person who is told that such a thing existed with regard to the candy manufacturer, but nobody would be likely to say from a bacteriological standpoint that it might not be very definitely injurious to health. So in the case of prosecution some two or three years ago of crab meat packers down on the Eastern Shore. The testimony was that the employees who picked with their hands the meat from the shell of the crab were not clean in their habits and were not required to wash their hands after going to the lavatory, in consequence of which it was alleged by the bacteriologists in a particular case that there were portions of human excreta in the canned product. Now, that case was tried before a jury and the jury found a verdict in favor of the Government, and I could not say that it was an improper verdict, although I think there was a motion for a new trial in the case, so whether the foreign substance which is alleged to be filthy is a really foreign substance and not a part of the whole operation of packing parts of the fish and getting along with the roe some parts of the viscera attached to the roe simply by virtue of lack of adequate care in making the separation, it seems to me there is a vast difference between the two kinds of foreign matter. In the case we have here, the matter that is included and alleged to be filthy is not foreign to the fish. It is at most a part of the fish which is not completely separated from the roe, while in the other case the foreign substance is something which is brought in quite unnecessarily and should undoubtedly be eliminated and could have been eliminated with care.

"Here I am impressed with the testimony of the defendant to the effect that no matter how much care is used, it is nearly always likely that some hidden parts of the viscera of the fish may be included. Take, for instance, a deviled crab. It is very disagreeable to some people in eating a deviled crab to get particles of the shell of the hard crab which have not been eliminated by the cook in preparing it, but no one could say that it is filthy or makes the deviled crab filthy. It makes it unattractive and unpleasant for some people in eating but it can hardly be said to be filthy, so when you have the delicate surgical operation of separating the small roe of a small herring, weighing six to eight ounces, from the surrounding membranes or tissues of the stomach or viscera, it is a delicate operation which often leads to inadequate separation but that is not an injection of extraneous and foreign matter into the product. It is simply a lack of care in separating the roe from the rest of the fish.

"Now, we have nothing here to the effect that the substance is decomposed or is injurious to health, but simply that it is unattractive. I think the witness, Mr. Hines, from Virginia, says it very definitely affects the grading for the purpose of commercial sale or the proper grading of the product for public sale, but it does not affect the health of the public.

"Now, that is the view I have of this particular case. Therefore, the verdict is for the claimant. If you want any judgment entered, well and good. If you want a more detailed finding of fact, I will be very glad to make it if you think it necessary."

In accordance with the court's opinion, the libel was dismissed and the product released to the claimant.

8918. Adulteration of frozen shrimp. U. S. v. 23 Boxes of Frozen Shrimp. Default decree of condemnation and destruction. (F. D. C. No. 7329. Sample No. 87555-E.)

LIBEL FILED: April 11, 1942, District of Maryland.

ALLEGED SHIPMENT: On or about October 8, 1941, by W. M. Wells and Sons, from Southport, N. C.

PRODUCT: 23 boxes, each containing 20 pounds, of frozen shrimp at Baltimore, Md.

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a decomposed substance.

DISPOSITION: July 7, 1942. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

8919. Misbranding of crab meat. U. S. v. 78 Cans of Crab Meat. Default decree of condemnation and destruction. (F. D. C. No. 15725. Sample No. 5813-H.)

LIBEL FILED: March 20, 1945, Southern District of New York.

ALLEGED SHIPMENT: On or about February 27, 1945, by J. H. Fleming & Co., Portsmouth, Va.

PRODUCT: 78 1-pound cans of crab meat at New York, N. Y.

LABEL, IN PART: (Cans) "DeLuxe Crab Meat"; (portion also labeled) "Packed For Lucien Prince & Co. Fulton Mkt. N. Y. C., N. Y."

NATURE OF CHARGE: Misbranding, Section 403 (e) (2), the product was food in package form, and it failed to bear a label containing an accurate statement of the quantity of the contents since the cans contained less than "1 Lb. Net," the declared volume.

DISPOSITION: April 6, 1945. No claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.

FRUITS AND VEGETABLES *

DRIED FRUIT

8920. Adulteration of apple chops. U. S. v. 1,240 Sacks of Apple Chops. Tried to the court and jury. Verdict for claimant. Judgment ordering dismissal of libel reversed on appeal, and case remanded by appellate court for entry of decree of destruction. (F. D. C. No. 11744. Sample No. 39651-F.)

LIBEL FILED: February 3, 1944, Southern District of California.

ALLEGED SHIPMENT: On or about December 9, 1943, by Jack Gomperts and Co., from Cashmere, Wash.

PRODUCT: 1,240 50-pound sacks of apple chops at Los Angeles, Calif. Analysis showed that the product contained an average of 0.327 grain of arsenic (as As_2O_3) per pound and an average of 0.560 grain of lead per pound.

NATURE OF CHARGE: Adulteration, Section 402 (a) (1), the article contained added poisonous and deleterious substances, arsenic and lead, which may have rendered it injurious to health.

DISPOSITION: The Washington Dehydrated Food Co., Yakima, Wash., claimant, having denied that the product was adulterated, the case came on for trial before a jury on May 11, 1944, at the conclusion of which the court gave the following instructions to the jury:

BEAUMONT, *District Judge*: "Gentlemen of the Jury: It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as the Court gives it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

"If the Judge has said or done anything which has suggested to you that he is inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion.

"I have not expressed, nor intended to express, nor have I intimated nor intended to intimate any opinion as to what witnesses are, or are not, worthy of credence; what facts are, or are not, established; or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

"You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the government, or the claimant, the manner in which he might be affected by the verdict and the extent to which he might be affected by the verdict and the extent to which he is contradicted or corroborated by

*See also Nos. 8803-8808, 8988.